Supreme Court, U. S.
FILED
MAY 17 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. [redacted] 83

MAH TOI,
Petitioner,

vs.

HERBERT BROWNELL, JR., as Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl C. Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Mah Toi, prays that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Ninth Circuit, affirming the lower Court's judgment that the petitioner herein is not a native born United States citizen.

OPINIONS BELOW.

The judgment of the District Court (R. 10-11) was entered without written opinion. The opinion of the Court of Appeals has not yet been officially reported, but it is printed in Appendix A hereto, pp. i-vii.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 16, 1955 (R. 140). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is a valid judgment of the Superior Court of the State of California, dated November 21, 1923, establishing the fact of an individual's birth in the State of California and within the jurisdiction of said Superior Court, entitled to full faith and credit under Article IV of the Constitution of the United States and Section 1738, Title 28, United States Code.

2. Where the government attempts to impeach a state court judgment by alleging that it was obtained by fraud, but offers no evidence of fraud, can the valid state court judgment be disregarded by the federal courts.

3. If the judgment of the Superior Court of the State of California is open to collateral attack, is such attack sustained by merely impeaching the credibility of the petitioner through prior inconsistent statements as to collateral events which occurred before he attained the age of 10 years.

STATUTES INVOLVED.

14th Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside."

Article IV of the Constitution of the United States, Section 1:

> "Full faith and credit shall be given in each State to the public Accounts, Records, and Judicial Proceedings of every other state."

28 U.S.C., Section 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal

exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 U.S.C.A. 903) which provides, in so far as pertinent here:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia, or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *"

STATEMENT.

Petitioner, Mah Toi, claims to have acquired United States citizenship at birth pursuant to the provisions

of the 14th Amendment to the Constitution of the United States.

Following his return to the United States on January 24, 1949, after a temporary trip to China, the Immigration and Naturalization Service ordered the petitioner excluded as an alien not in possession of a valid immigration visa. Thereafter, petitioner instituted this suit in the Court below seeking a judicial declaration of his United States citizenship as provided by Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903).

In support of his complaint petitioner offered the judgment roll in Cause No. 141,143, Superior Court, in and for the City and County of San Francisco, State of California, wherein an order of that Court dated November 21, 1923, recites that one Mah Toi, the son of Mah Lin Ong and Wong Shee, was born in the City and County of San Francisco, State of California, on November 1, 1902 (Exh. 2, R. 29). The respondent in his answer admits that this record relates to petitioner (R. 7); that such judicial record of the petitioner's birth still exists (R. 25); but affirmatively asserts that said order was obtained through fraud (R. 7).

Petitioner testified that he was born at San Francisco, California on November 1, 1902 (R. 22); that the foregoing court record relates to him; and that a certified copy of the Superior Court order (Exh. 1; R. 26) was in his possession from the time of entry of judgment in 1923 until taken by the Immigration and Naturalization Service following his arrival in 1949.

Respondent presented two witnesses, Mr. Herbert Cole, who testified concerning the conditions of Chinatown shortly after the earthquake and fire of 1906 (R. 80), and Mr. George W. Heckert, an investigator of the Immigration and Naturalization Service. Investigator Heckert identified respondent's Exhibit "A" as a map of Chinatown, San Francisco, prepared in 1903, and was permitted to testify, limited solely to impeaching the credibility of the petitioner (R. 66), concerning certain inconsistent statements allegedly made by petitioner to Investigator Heckert and other officers of the Immigration and Naturalization Service.

No evidence was offered by respondent to controvert the Superior Court judgment establishing the fact of petitioner's birth. In his summation of the evidence, the trial judge stated:

(R. 104):

"The Court. I will say this, so that you will have full opportunity to answer it if you can: If the petitioner's testimony was thrown out entirely, then what have we here?

Mr. Bonsall. If you throw out the order along with it, he has not sustained the burden of proof.

The Court. What order?

Mr. Bonsall. The order of the Superior Court.

The Court. How could I throw it out?

Mr. Bonsall. Your honor, I am of the opinion that we are not bound by that order; I may be wrong.

The Court. I don't say that you are or you are not, but how are you going to throw it out?

Mr. Bonsall. It is some evidence.

The Court. Certainly, it is some evidence.

Mr. Bonsall. It is some evidence.

The Court. Let us turn to the Government evidence to rebut that on this record."

(R. 106):

"The Court. It may have indirect relationship to our factual situation and our problem. From the standpoint of this record, throw everything out of this case, and suppose we just had this decree."

(R. 125):

"The Court. In the absence of anything else, how can I say that he is not entitled to citizenship?

Mr. Bonsall. We are not bound by that. You might find otherwise.

The Court. You say you are not bound by it, but the Federal courts recognize it for what it is worth. It is admissible in evidence and it raises a presumption, and unless that presumption is rebutted, where do we find ourselves?"

(R. 126):

"The Court. * * * I think that the question should go forward so that the Supreme Court can give us guidance in the future and we wouldn't have so much difficulty. Do I make myself clear?"

Contrary to his expressed views, the trial judge sustained a finding that the petitioner was not born in the United States. The Court of Appeals for the

Ninth Circuit affirmed, holding that the fact finding of the trial Court was not clearly erroneous. (R. 135.)

REASONS FOR GRANTING THE WRIT.

This writ of certiorari is sought because the issues presented herein involve basic rights guaranteed to native-born citizens by the Constitution of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other circuits.

1. The 14th Amendment to the Constitution of the United States specifically provides that any person born in the United States and subject to the jurisdiction thereof is a citizen of the United States *and a citizen of the State* wherein he resides.

Miller Bros. Co. v. Maryland, 347 U.S. 340, 345.

A distinction between citizenship of the United States and citizenship of a State was clearly recognized by this Court in the *Slaughter-House Cases,* 16 Wall. 36, 74.

The right to confer State citizenship lies originally and immediately in the various States. Neither by the Constitution nor by statute has the United States attempted to reserve to itself the power or right to determine facts relating to an individual's birth or to determine State citizenship. In the absence of a Constitutional provision or Congressional legislation preempting the field and delegating exclu-

sive power to the Federal government, the powers to enact legislation are reserved to the States.

10th Amendment to the Constitution of the United States.

Pursuant to statutory law of the State of California,[1] petitioner herein, in 1923, obtained in the Superior Court, a Court of record and competent jurisdiction, a judgment declaring that he was born in the City and County of San Francisco, State of California on November 1, 1902. Such judgment, in effect, conferred upon petitioner state citizenship under Section 51 of the California Political Code.

The constitutionality of this exercise of State power, determination of place of birth within the State and State citizenship, has never been questioned. The State statute created a judicial process for determination of State rights. It does not impinge any field of Federal legislation, including Article I, Section 8, Clause 4 of the Constitution of the United States reserving to the United States the power to establish a uniform Rule of Naturalization. The provisions thereof did not confer upon the Federal government authority to determine the questions determined by the state court proceedings referred to above. Naturalization has been defined by this Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen * * *". *Boyd v. Nebraska,* 143 U.S. 135, 162. "The term 'naturalization'

[1]Section 10600 et seq., Health and Safety Code, State of California.

means the conferring of nationality of a state upon a person after birth." Section 101(a)(23) of the Immigration and Nationality Act; 66 Stat. 166; 8 U.S.C.A. 1101(a)(23).

Article IV, Section 1, of the Constitution of the United States provides that "Full Faith and Credit shall be given in each State to the * * * Judicial Proceedings of every other State." The provisions of that part have been extended to all courts, Federal as well as State.

Judiciary Act of May 26, 1790, I Stat. 122, as amended, Rev. Stat. 905, 28 U.S.C.A. 687; now 28 U.S.C.A. 1738;

Davis v. Davis, 305 U.S. 32, 40;

Mills v. Duryea, 7 Cranch 481, 485.

The conclusive effect of a State statute legitimating a child, even though such state process conferred retroactively citizenship of the United States, has been acknowledged by the Attorney General of the United States. 32 Op. A. G. 162, 164; 39 Op. A. G. 556, 557.

In *Ennis v. Smith,* 14 How. 400, 430, this Court held that an adjudication in a foreign country as to relationship and pedigree was a proceedings in rem, binding on the whole world, and entitled to full faith and credit in the Courts of the United States.

Compare:

Christianson v. King County, 239 U.S. 356, 371, 372;

O'Connor v. Stanley, 54 F2d 20, 26 (8 Cir., 1931).

The Court of Appeals for the Second Circuit has held that a state court default judgment entered against a trustee in bankruptcy, was binding upon the bankruptcy trustee even though he had not received personal service. *Glasser v. Wessel,* 152 F2d 428, 430 (2 Cir., 1945), Cert. Den. 328 U.S. 839. Federal agencies may not disregard a State Court judgment even though they were not a party to that proceeding and had no notice thereof.

Sharpe v. Commissioner, 303 U.S. 624;
Blair v. Commissioner, 300 U.S. 5, 10.

Applying the recognized principles and the dominant policy intended to be protected and promoted by the full faith and credit provisions of the Constitution and its extension in the Federal Rules of Civil Procedure, there is but one conclusion--the judgment of the Superior Court in and for the City and County of San Francisco, State of California, is conclusive and binding in the Federal Courts concerning the question of the petitioner's place of birth. As a valid judgment of a Court of competent jurisdiction it is entitled to recognition at this time.

2. The decision of the Court below permitting the respondent to collaterally attack the State Court judgment is in direct conflict with the provisions of Rule 9(b) of the Federal Rules of Civil Procedure, which require that a party pleading special matters such as fraud or mistake affirmatively allege the circumstances constituting fraud or mistake with particularity.

In reply to the allegation of the complaint setting forth the State Court judgment, the respondent stated:

> "* * * admits that order establishing the fact of plaintiff's birth in the City and County of San Francisco, State of California, on November 1, 1902, was entered by the Superior Court of the State of California in and for the City and County of San Francisco on November 21, 1923. Defendant affirmatively asserts that said order was obtained through fraud." (R. 7).

This is not a suit against the United States in its sovereign capacity. The complaint formally designated the respondent as party defendant solely in his representative capacity as head of the department or agency which had denied the petitioner a right or privilege as a national of the United States.

Tom Wing Po v. Acheson, 214 F2d 661 (10 Cir., 1954);

Acheson v. Furusho, 212 F2d 284 (9 Cir., 1954).

The respondent has no different standing in this Court than any other party defendant. Petitioner's judgment acquired under State law is not subject to collateral attack in either the State or Federal Court unless it is established that the State court did not have jurisdiction of the subject matter and of the person. Since the jurisdiction of the State court has not been challenged, the judgment of that Court is entitled to full faith and credit in this proceeding.

3. The adverse finding of the trial Court was clearly erroneous as a matter of law, and, under Rule 52(a) of the Federal Rules of Civil Procedure, the Court of Appeals should have set the same aside.

United States v. United States Gypsum Co., 333 U.S. 364, 395.

A judgment entered by a Court of competent jurisdiction presumes jurisdiction over the subject matter and over the person.

Titus v. Walleck, 306 U.S. 282;
Adam v. Saenger, 303 U.S. 59.

A judicial decree is presumed to be valid and one assailing the decree must prove the alleged invalidity.

Esenwein v. Com. of Penna., 325 U.S. 279.

Compare:

Williams v. No. Carolina I, 317 U.S. 287;
Williams v. No. Carolina II, 317 U.S. 287;
Sherrer v. Sherrer, 334 U.S. 343;
Coe v. Coe, 334 U.S. 378.

In *Grant Bros. Constr. Co. v. U. S.,* 232 U.S. 647, 663, 664, this Court stated:

> "It is true that the defendant was not a party to that proceeding, and that, as a general rule, a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, as a prima facie, but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death, and the like and this because the judgment is usually more persuasive than mere evidence of reputation."

Compare:

Yuen Boo Ming v. United States, 103 F2d 355 (9 Cir., cases cited therein).

If prior determinations of an administrative agency present a prima facie showing, the rule is more ap-

plicable where the determination is made by a Court of competent jurisdiction of a sovereign state acting within its constitutional powers. This being true, the judgment of the Superior Court of the State of California in and for the City and County of San Francisco, is sufficient to establish the petitioner's birth in the United States, and, if uncontradicted by other evidence, demands a judgment in petitioner's favor.

> "Prima facie evidence is a minimum quantity; it is that which is sufficient to raise a presumption of fact; or, again, it is that which is sufficient, when, unrebutted, to establish the fact."
>
> *Otis & Co. v. Securities & Exchange Commission,* 176 F2d 34, 42 (C.A., D.C., 1949), Rev. other grounds 338 U.S. 843.

The Court of Appeals for the Fifth Circuit in *Gilmore v. U. S.,* 93 F2d 774, at page 776, stated:

> "The vice in the instruction seems to be in confusing the burden which lies upon a plaintiff to establish the facts which constitute the cause of action, and the duty of going forward with the evidence to rebut a presumption which arises from facts proven on the trial. The former rests upon the party who substantially asserts the affirmative of the issue, the latter upon the party against whom an unfavorable inference has been deduced from the testimony. The burden of proof never shifts, but the duty of rebutting presumptions, drawn by a process of probable reasoning from one or more matters of fact appearing in evidence, may shift during the progress of trial from one party to the other."

Also see:

Aetna Ins. Co. of Hartford v. Taylor, 86 F2d 225, 226 (5 Cir., 1936).

A presumption may establish a prima facie case and sustain the burden of proof as to the issues it covers. This presumption continues until such time as the opposing party rebuts the prima facies by substantial evidence. If the opposing party fails to offer substantial evidence in opposition, the case must be decided upon the evidence of the proponent.

Del Vecchio v. Bowers, 296 U.S. 280, 285, 286.

Once a prima facie claim of United States citizenship has been established, the burden of proving alienage rests upon the government. See *U. S. v. Tod,* 264 US 149, 152, 193.

To reject the judicial proof offered by petitioner, there must be substantial evidence which would be regarded by fair minded persons as adequate to rebut the presumption. It requires more than unsupported allegations and remarks of counsel.

Compare:

Schneidermann v. U. S., 320 U.S. 118, 167, 168;
Baumgartner v. U. S., 322 U.S. 665.

No evidence which would tend to establish alienage of the petitioner or attack the authenticity of the judicial decree is present in the record. On cross-examination, respondent sought to impeach the credibility of the petitioner, by lengthy testimony relating to events which occurred between the time of petitioner's

birth and attaining the age of ten years. As the trial Court stated: "In summarizing the testimony as a whole, there is no testimony of substance at all. There is a presumption of what happened in the State Court." (R. 125) "In the absence of anything else, how can I say that he is not entitled to citizenship." (R. 125).

The alleged impeachment and inconsistencies in no way related to the ultimate issue, the question of the place of birth of the petitioner herein. They related to events and occurrences which occurred at a tender age when children vary radically in their powers of observation, as they differ in temperament, interests, and viewpoint, not to mention natural powers of observation and retention of visual impressions.

The Court of Appeals relied upon inference and suspicion to overcome the affirmative prior judicial determination of petitioner's place of birth. Discussing a few (R. 129), we find:

(1) *Disparity of signature.* Respondent in his answer admitted that the judgment of the State Court related to this petitioner. Neither proof nor finding is required in support of an allegation admitted in the pleadings.

Armstrong Paint & V. Works v. Nu Enamel Corp., 305 U.S. 315, 322.

(2) *Inability to speak English.* It is interesting to note that the alleged prior inconsistent statements used by respondent for impeachment purposes were taken in English (R. 63).

(3) *Name of mother.* No consideration is given to the custom of persons of Chinese racial extraction. The status of Chinese women is such that they are only identified as identified in this and the prior Court record. Encyclopedia Britannica, 14th Ed., Vol. 5.

(4) *Failure of petitioner to present witnesses.* Unfavorable inferences cannot be drawn for failure to present cumulative evidence. *DeGregorio v. United States,* 7 F2d 295, 296 (2 Cir., 1925).

(5) *Inconsistent statements.* Statements admitted to impeach the credibility of a witness have no probative value. *Twentieth Century Fox Film Co. v. Dieckhaus,* 153 F2d 893 (8 Cir., 1946), cert denied 329 U. S. 716. Compare: *Gordon v. U. S.,* 344 U.S. 414 (note 13).

(6) *Record of departure of family.* The trial Court did not admit the report (R. 74). Respondent did not present the original records (R. 73). Respondent's witness admitted that no statute required the keeping of departure records (R. 79). Such evidence was properly excluded as not meeting the requirements of 28 U. S. C. A. 1732.

The State of California enacted a statute which provided for the welfare of its inhabitants. The judgment obtained thereunder related to internal affairs of the State-determination of who was born within the State. Due process did not require notice to this respondent where rights are established in conformity with state law. See *Erie Railroad Co. v. Tompkins,* 304 U. S. 64. Compare *Griffin v. Griffin,* 327 U. S. 220, 234.

Respondent presented no probative evidence sufficient to rebut the presumption of the validity of the State Court judgment. An attempt to cast doubt by impeachment, as to issues collateral to the matters in dispute, is not credible evidence, and, is not affirmative proof of alienage. It was not necessary that evidence most favorable to petitioner's contention carry conviction beyond a reasonable doubt. The quantum of evidence, in whose favor it preponderates, shall be determinative as to whether the evidence sustains the burden of proof. *Lilienthal's Tobacco v. U. S.*, 97 U.S. 237. Also compare the statement of this Court in *Kwock Jan Fat v. White,* 253 U.S. 454, 464, that: "* * * It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

This Court in *United States v. Wong Kim Ark,* 169 U. S. 649, determined that all children born in the United States, regardless of race or nationality, if not exempt from the territorial jurisdiction, are citizens of the United States. Also see *Perkins v. Elg,* 99 F2d 408, cert. granted 309 U.S. 591, modified other grounds 307 U. S. 325. Petitioner, not by oral or written extrajudicial statement, but by a judicial finding of a Court of competent jurisdiction more than thirty years ago, established he was born in the City and County of San Francisco, State of California on November 1, 1902. Under the Constitution of the United States, and the foregoing expressed rule of this Court, there is but one conclusion—petitioner established his claim to United States nationality.

CONCLUSION.

Petitioner's judicial evidence of record stands unimpeached. The trial Court stated there was no evidence to controvert this affirmative showing but indicated the question should go forward to the Supreme Court of the United States for final determination. The adverse decision in the Court below affects substantial rights which should not be lightly disregarded or rejected by speculation and erroneous inferences.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 6, 1955.

JOSEPH F. HERTOGS,
Attorney for Petitioner.

(Appendix A Follows.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Mah Toi,
Appellant,
vs.
Herbert Brownell, Jr., as Attorney General,
Appellee.

No. 13,563
Feb. 16, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge, and POPE, Circuit Judge, and BOLDT, District Judge

BOLDT, District Judge

Appellant seeks to establish that he is a citizen of the United States, proceeding under 8 USC 903 and basing his claim to such status on the allegation that he was born in the City of San Francisco, California, on November 1, 1902 and by reason of native birth is a citizen under the Fourteenth Amendment to the federal Constitution. The only evidence offered at the trial is support of appellant's petition was the personal testimony of appellant and the admission in evidence of the judgment roll in Cause No. 14,143 of the California Superior Court for San Francisco County wherein an order of that court dated November 21,

1923, recites that one Mah Toi, the son of Mah Lin Ong and Wong Shee, was born on November 1, 1902, in the City and County of San Francisco, State of California. A certified copy of the order was admitted in evidence on the testimony of appellant that he is the person named in the order and that the copy had been in his possession from November, 1923 until January, 1949, when it was given to the immigration authorities at San Francisco on appellant's return to the United States from a visit in China of almost two years.

In appellant's petition it is alleged, in effect, that appellant is the person named in the order referred to. Answering such allegation, appellee denied that appellant was born at the place and on the date alleged and denied that a "judgment establishing fact of plaintiff's birth in the United States was entered by superior court of State of California," but the answer admits that "order establishing the fact of plaintiff's birth [at the place and on the date alleged] was entered by the California Superior Court for San Francisco County on November 21, 1923." In appellee's brief it is contended that appellant did not establish his identity as the person named in the superior court order, but the admissions in the answer preclude appellee from urging such contention. Neither proof nor finding is required in support of an allegation admitted in the pleadings.

Sun-Maid Raisin Growers Ass'n. v. Neustadter Bros., 115 F.2d 126.

Fontes v. Porter, 156 F.2d 956.

After hearing the evidence the district court took the cause under advisement and thereafter entered a finding of fact that appellant was not born in the United States, a conclusion of law that appellant is not a national of the United States, and a judgment holding appellant not a national or citizen of the United States. The appeal from the judgment specifies error in both the finding and conclusion, and in the failure of the district court to give full faith and credit to the California superior court order.

Appellant acknowledges that the burden rested on him to "establish the ultimate facts by a preponderance of the evidence." The ultimate fact to be so established was that appellant was born in the United States. Appellant contends that the burden of proof was sustained: first, because the superior court order was a final and conclusive adjudication of the fact; and second, because the order, together with appellant's testimony, made a prima facie showing of the fact which was not rebutted by the evidence.

The frequent assertions in appellant's brief that the superior court order *conclusively* established the fact of appellant's birth as stated in the order are not supported by citation of California statute or decision or other authority and we have found no authority to such effect. 28 USC 1738 provides that state " . . . records and judicial proceedings or [authenticated] copies thereof . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." The question is:

What "faith and credit" do California superior court orders determining place and time of birth entered in pursuance of Section 10600 of the California Health and Safety Code have under the statute and decision law of that state? Nowhere in the particular statutory section authorizing entry of such orders, or in the chapter of which it is a part, is there any statement as to the evidentiary effect of such orders. The several California statutes generally defining the evidentiary effect of various orders, judgments and presumptions do not contain any provision applicable to orders made under Section 10600.

Section 10600 is found in a chapter entitled "Proceedings to Establish Record of Birth, Death or Marriage," which chapter is in a subdivision designated "Vital Statistics" of the California Health and Safety Code. The wording of the section and its context make it clear that a judicial order determining place and date of birth under Section 10600 is a statistical record substituting for a birth certificate when the birth "was not at the time it occurred required by the law to be registered; or was not registered in conformity with the provisions of the law in effect at the time it occurred . . ." Under Sections 10175, 10178 and 10179 of the same Code a birth certificate must be made by the attending physician or midwife or by the parents within four days after the birth. An order under Section 10600 may be made by the superior court on secondary evidence at any time, however long after the birth. Neither law nor reason justifies holding an order to be of greater evidentiary

value than a certificate in establishing the place and time of birth when such facts are in issue in a proceeding concerned with United States citizenship.

Section 10551, preceding Section 10600 in the same subdivision of the California Health and Safety Code, provides that a birth certificate is "prima facie evidence" of the facts it purports to certify. The California courts hold the presumption arising from such prima facie evidence rebuttable and not conclusive.

> ". . . Prima facie evidence [of a birth certificate] is not conclusive evidence; it simply denotes that the evidence may suffice as proof of a fact until or unless contradicted and overcome by other evidence." *In Re Woodson's Estate,* 36 CA 2d 77, 96 P.2d 1016, cited to the same effect in *People v. Kelly,* 77 CA 2d 23, 174 P.2d 342.

The rule is general as stated in 32 C.J.S., Section 766(b):

> "Official [birth] certificates are prima facie, but not conclusive, evidence of the facts stated therein and with respect to some certificates this rule has been declared by statute."

In *U. S. v. Casares-Moreno,* 122 Fed. Sup. 375, a criminal case involving whether defendant was a native-born citizen of the United States, the evidentiary weight of a birth certificate recorded by an order of the California superior court was found as above stated herein.

"Prima facie evidence is a minimum quantity; it is that which is sufficient to raise a presumption of fact; or, again, it is that which is sufficient, when rebutted,

to establish the fact." *Otis & Co. v. Securities and Exchange Commission,* 176 F.2d 34. The evidence supporting the superior court order in this particular case was minimal in quantity and weight. Neither of the two witnesses heard by the court, testifying twenty-two years after the event, was present at the birth or competent under California law to make a certificate thereof.

Appellant concedes that if the superior court order was not conclusive evidence of the fact of appellant's native birth as a matter of law, its admission in evidence did not shift the burden of proving the fact, but merely required that substantial evidence rebutting the presumption be presented to the court. The final question then is whether there is sufficient evidence in the record to sustain the trial court's finding of fact, it appearing therefrom that the trial court found the presumption rebutted—at least to the extent of evenly balancing the weight of all the credible evidence with no preponderance thereof in favor of appellant.

Among the circumstances shown by the evidence which together amply sustain the district court's finding are: some apparent disparity between the signature of petitioner on the superior court petition and that on the petition in the present proceeding; the claimed inability of appellant to speak or understand the English language notwithstanding recitals in the verification of both petitions indicating the contrary; the inability of appellant to give the name of his alleged sister, or three alleged brothers, or of his

alleged mother except by a name designating her as a married woman of the Wong family, as recited in the birth record order; the absence of any record showing departure for China of appellant's alleged family which he testified occurred in 1906; the improbability of and failure of explanation for such permanent departure of appellant's alleged family, including both older and younger children, at a time when appellant was a very young child; the failure of appellant to produce a single witness confirming his claimed continuous residence in San Francisco and vicinity for over 45 years prior to his alleged departure for China in 1947; appellant's failure to attend a public school located within a city block of his claimed places of residence during his school age, as required by California law; and various inconsistent statements made to immigration authorities concerning his alleged relatives and his various places of residence in San Francisco. These circumstances, together with the district court's unfavorable impression of appellant's testimony expressed in the record, preclude our holding that the fact finding of the trial court was clearly erroneous. The judgment is affirmed.

(Endorsed:) Opinion. Filed Feb. 16, 1955.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 802

MAH TOI, PETITIONER

v.

HERBERT BROWNELL, JR., AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-vii; R. 135-139) is reported at 219 F. 2d 642.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1955 (R. 140). The petition for a writ of certiorari was filed on May 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

APPENDIX

QUESTIONS PRESENTED

1. Whether, in a proceeding under the Nationality Act of 1940, a California court order entered in a proceeding to establish record of birth was conclusive evidence of petitioner's birth in the United States.

2. Whether there was sufficient evidence to support the trial court's finding that petitioner was not born in the United States.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

Article IV, Section 1 of the Constitution of the United States provides in part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U. S. C. [1946 ed. Supp V] 1738 provided:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> * * * * *
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court

within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U.S.C. [1946 ed.] 903, provided in part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *.

Deering's General Laws of California [1924], Part 2, Act 9008, provided in part:

> § 21. *Certified copies of records. Fee for searching files.* The state or local registrar shall forthwith upon request supply to any applicant a certified copy of the record of any birth or death or marriage registered under provisions of this act, for the making and certification of which he shall be entitled to a fee

of fifty cents, to be paid by the applicant. And any such copy of the record of a birth or death or marriage when properly certified by the state or local registrar to have been so registered within a period of one year from the date of the event, shall be prima facie evidence in all courts and places of the facts therein stated. * * *

(b) *Petition to court to establish record. Order of court. Form.* If, upon such search it shall develop that for any cause any birth or death, or marriage, occurring in this state was not registered in conformity with the provisions of law in effect at the time when such birth or death or marriage occurred by the filing of the certificate therefor with the local registrar within a period of one year from the date of the event, any person beneficially interested in establishing of record the fact of such birth or death or marriage may petition the superior court of the county in which such birth or death or marriage is alleged to have occurred for an order judicially establishing the fact of such birth or death or marriage. Such petition shall be verified and shall contain all the data necessary to enable the court, upon hearing the same, to determine the fact of such birth or death or marriage upon the proofs adduced in behalf of the petitioner at the hearing thereof. A copy of such petition shall be served upon the local registrar of vital statistics, and also upon the district attorney of the county in which such birth or death or mar-

riage is alleged to have occurred, and either of said officials shall have the right in his discretion to appear at such hearing and oppose the making of such order. * * *

If, upon such hearing, the proofs of the allegation of the petition are established, to the satisfaction of the court, the court may make an order determining that such birth, death or marriage did in fact occur in such county and at the time shown by the proofs adduced upon such hearing.

Such order must be made in the form and upon the blank prescribed and furnished by the state registrar and but one birth, death or marriage may be included therein. And said order shall become effective upon the filing of a certified copy thereof with the local registrar of vital statistics, and the delivery therewith for transmittal to the state registrar of a standard certificate containing such facts and signatures as are obtainable, and upon the filing of a certified copy of said order with the state registrar.

Rule 52(a), Federal Rules of Civil Procedure, provides in part:

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

STATEMENT

Pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. [1946 ed.] 903) petitioner, in

November, 1951, instituted an action in the United States District Court for the Northern District of California seeking a judgment declaring him to be a citizen of the United States (R. 3-6). In his complaint, he alleged that he was born in San Francisco in 1902; that a judgment establishing such fact was entered in the Superior Court of California in 1923; that he left the United States with a United States passport in 1947 and returned in 1949; and that he was thereupon excluded on the ground that he was an alien not in possession of an unexpired immigration visa (R. 3-4). The answer denied that plaintiff was born in the United States (R. 7). The government admitted the entry of the order in 1923 by the Superior Court of California, but denied that the order established the facts relating to petitioner's birth and affirmatively asserted that it was obtained by fraud (R. 7). The answer also asserted that petitioner's United States passport was obtained by fraud and that petitioner "is not now and never has been a citizen of the United States" (R. 8).

At the trial, petitioner, who had to be questioned through an interpreter (R. 18-22), introduced the 1923 order of the Superior Court of California. He testified that he had obtained it in 1923 and that it related to him. (R. 22-26, 28-29.)

On cross-examination, petitioner testified that he was the fourth of five children born to his parents in the United States; that his parents and the four other children went to China in 1906 on a ship called the "Korea", leaving him, a child of four years, in

San Francisco (R. 31-33); and that he could not remember the names of any of his brothers and sisters (R. 34). He could not name his mother other than that she was called Wong Shee [meaning a married woman of the Wong family] (R. 51). He did not know whether she had any relatives (R. 52). He testified that his mother and father were dead, but when asked how he knew that fact, he said that, since he could not find out anything about them, "to me they were just as well believed to be dead." (R. 33, 35.) He could not remember whether he had seen his parents depart when he was four years old (R. 36-37), but testified that his parents told him that, when he reached twenty-one, he could go to court and obtain a document (R. 38). Although the Immigration Service, since 1882, has kept a record of Orientals departing for the Orient, there is no record of the departure of the alleged parents on the "Korea" (R. 78-79).

Petitioner testified that, after his parents left, he was raised by an uncle (R. 27), but that he did not know where the uncle was since he had not seen him for the past twenty years (R. 31). He testified that he last saw his uncle a year or so after he obtained the 1923 California court certificate (R. 57). To an immigration inspector who questioned him on January 26, 1949, petitioner had stated that he had not seen his uncle since he was ten years old (R. 63, 67).

Petitioner did not know the residence of the witnesses who had been used when he obtained the 1923 California order; he testified that he had not seen

them for twenty years and believed them to be dead (R. 39-42). He testified that he never went to school in the United States although he knew there was a public school near where he said he lived (R. 41). He testified that he lived at 700 Jackson St. in San Francisco until he was from six to ten years old (R. 30, 36, 55) and then in Washington Street when he was 10, 14 and 20 years of age (R. 45, 56). Before the Immigration Service he had testified that he did not know where he was living during those years (R. 50-51). He testified that he was living at the Jackson Street address in 1906, at the time of the earthquake; that he remembered it, and that the house was not destroyed (R. 56-57). A witness for the government, who had lived in San Francisco all his life, testified that he visited Chinatown after the earthquake and that there were no buildings standing that could have been occupied (R. 80).

In its oral comments at the close of the trial, the district court indicated that it was not impressed by petitioner's credibility and that it thought "he fabricated" (R. 89). The formal findings were to the effect that petitioner was not born in the United States and was not a national of the United States (R. 12). Accordingly, judgment was entered for respondent (R. 10). On appeal, the judgment was affirmed (R. 140). The court of appeals held that the California order of 1923 was entitled to no greater evidentiary weight than a birth certificate for which it is a substitute; that a birth certificate is merely prima facie evidence which can be rebutted; and

that all the circumstances, including the inconsistencies in petitioner's testimony, justified the conclusion of the trial court that the presumption had been rebutted and that petitioner had failed to prove his United States citizenship (R. 135-139).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that under the full faith and credit clause of the Constitution (Art. IV, sec. 1). as extended by statute to the federal courts (28 U. S. C. [1946 ed., Supp. V] 1738), federal agencies and courts are conclusively bound by the 1923 order of the Superior Court of California; that this established his birth in the United States; and that it was beyond the authority of the trial court to go behind the decree of the California court. We believe the fallacy of this position was effectively exposed by the court below (R. 135-139).

Under the full faith and credit clause, the state court order could be entitled to no more credit than it would receive in the state where it was rendered. 28 U. S. C. 1738; see, also, *Halvey* v. *Halvey,* 330 U. S. 610; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Morris* v. *Jones,* 329 U. S. 545. Although there appear to be no California decisions on the precise effect of such an order, the controlling statutory provisions (*supra,* pp. 3-5) plainly indicate that such an order is in the nature of a delayed birth certificate and can constitute no more than prima facie evidence of the events recited therein.

The preamble to Act 9008, under which the order

was obtained, states that the purpose of the statute is to "provide a central bureau for the preservation of records of marriages, births and deaths, and to provide for the registration of all births and deaths, * * * [and] the issuance * * * [of] certificates of births and deaths * * *." Section 13 imposes a duty upon attending physicians and others to register all births with local officials. Section 21 (*supra,* p. 4) provides that the established records "shall be prima facie evidence * * * of the facts therein stated." See *Woodson Estate,* 36 Cal. App. 2d 77, 96 P. 2d 1016; also, *Lee Leong* v. *United States,* 217 Fed. 48 (C. A. 9). Section 21 (b) (*supra,* pp. 4-5) comes into play if a search reveals a failure in the records. In that event, a person beneficially interested in remedying the defect may file a petition in court. State officials may appear in their "discretion", but the proceeding need not be adversary. If the court is satisfied in the premises, it is to make an order "in the form and upon the blank prescribed and furnished by the state registrar * * *." Since the procedure is one for securing a substitute or delayed recording, there is no reason to suppose that the record thus obtained is to receive any greater weight than a record made contemporaneously with the event in question. When the district court held (R. 125) that the Superior Court order was "admissible in evidence and it raises a presumption," it gave it the maximum weight to which it was entitled.[1]

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[1] In *Ex parte Lee Fong Fook,* 74 F. Supp. 68 (N.D. Cal.), affirmed on other grounds, 170 F. 2d 245 (C.A. 9), certiorari

In sum, this case presents no issue of full faith and credit. It turns on the holding of the courts below that, *as a matter of California law*, the Superior Court's order, entered in a proceeding to establish record of birth, was not a conclusive determination. Certainly, in the absence of a contrary decision by the California courts, there is no occasion for this Court to consider a question of local law as to which the federal courts sitting in California are in agreement.

2. Similarly, there is no occasion for the Court to review the evidence underlying the concurrent findings of the courts below. The circumstances which showed petitioner's claim unworthy of belief are summarized in the court of appeals' opinion (R. 139) and in the Statement, *supra*, pp. 6-8. In the light of these circumstances and the trial judge's observation that petitioner was not a credible witness, it is plain that the findings cannot be regarded as "clearly erroneous." Rule 52(a).

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denied, 336 U.S. 914, another district judge rejected the contention that a state court order of the type here involved is conclusive in an immigration proceeding. Cf. *Lum Kim* v. *United States*, 225 Fed. 31 (C.A. 6), and *Ex parte Wilson Seen Lee*, 49 F. 2d 468 (W.D. Wash.), to the effect that a delayed birth certificate has no probative value.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 949601 1400